IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM
No. 76-930

DIXY LEE RAY, Governor of the State of Washington; SLADE GORTON, Attorney General of the State of Washington; JOHN C. HEWITT, Chairman, and HARRY A. GREENWOOD, BENJAMIN W. JOYCE, PHILIP H. LUTHER, and J. Q. PAULL, Members, Board of Pilotage Commissioners; DAVID S. MCEACHRAN, Whatcom County Prosecuting Attorney; CHRISTOPHER T. BAYLEY, King County Prosecuting Attorney; COALITION AGAINST OIL POLLUTION; NATIONAL WILDLIFE FEDERATION; SIERRA CLUB; and ENVIRONMENTAL DEFENSE FUND, INC.,

Appellants,

v.

ATLANTIC RICHFIELD COMPANY, and SEATRAIN LINES, INC.,

Appellees.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO AFFIRM

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STATE PRINTING PLANT — OLYMPIA, WASHINGTON

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On Appeal From The United States District Court For The Western District Of Washington

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BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO AFFIRM

Appellants, Dixy Lee Ray, Governor of the State of Washington, *et al.*,[1] pursuant to Rule 16(4), submit this brief in opposition to Appellees' motion to affirm primarily in order to dispel the misleading impression that (1) the legislative history of the Ports and Waterways Safety Act of 1972, Pub. L. No. 92-340, 86 Stat. 424 (the "PWSA") reflects an unambiguous intent to preempt state law; and (2)

[1]On January 12, 1977, Dixy Lee Ray succeeded Daniel J. Evans as Governor of the State of Washington and John C. Hewitt became the Chairman of the Board of Pilotage Commissioners. Pursuant to Rule 48(3) of the Rules of the Supreme Court, they are therefore substituted as Appellants for former Governor Evans and for William C. Jacobs, respectively.

Chapter 125 of the Laws of the State of Washington, 1975, First Extraordinary Session, codified at R.C.W. §§ 88.16.170 *et seq.* ("Chapter 125") is inconsistent with the objective of the PWSA to encourage the development of adequate international standards regulating tanker-generated oil pollution.

I. The Legislative History of the PWSA Does Not Demonstrate An Unambiguous Intent to Preempt State Law

Neither the history of Title I nor the history of Title II of the PWSA demonstrates an unambiguous intent to preempt all state regulation of tanker pollution hazards.[2] It is thus not surprising that the District Court relied on no such history in reaching its decision.

In order to understand the intent of the framers of Title I, this legislation must be put in historical context. Prior to 1972, the Coast Guard's authority to regulate port safety was fragmented. It acted under three separate grants of authority: the Tank Vessel Act of 1936, 49 Stat. 1889; the Magnuson Act, 50 U.S.C. § 191; and 46 U.S.C. § 170. Significantly, the first two statutes were wholly silent as to preemption, while the third contained a specific

[2]A finding of preemption must be based on a clear and unmistakable expression by Congress of the intention to preempt state regulation. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963); and *Reid v. Colorado*, 187 U.S. 137, 148 (1902).

waiver of preemption.[3] It thus can scarcely be said that, prior to 1972, regulation of the movement of hazardous cargoes in our ports and waterways was recognized by Congress as an exclusively federal function.

The purpose of Title I was simply to place Coast Guard regulation on a more permanent and broader statutory footing, confirming existing authority and extending it to allow for the establishment of vessel traffic control systems made possible by newly developed technology. See generally H.R. Rep. No. 92-563, 92d Cong., 1st Sess. 3 (1971). While the legislative history of Title I of the PWSA reflects some concern about the regulation of vessels by state and local authorities, this concern was directed primarily at situations where *conflict* might arise between state and federal legislation, see, e.g., Statement of James Reynolds, President, American Institute of Merchant Shipping, in *Hearings Before the Subcommittee on Coast Guard, Coast and Geodetic Survey and Navigation of the House Committee on Merchant Marine and Fisheries on H.R. 17830, H.R. 18047, H.R. 15710*, 91st Cong., 2d Sess. 181-182 (1970), and even more particularly at equipment regulations and safety standards which relate directly to implementation of vessel traffic systems. See, e.g., Testimony of John Reed, Chair-

[3]46 U.S.C. § 170(7)(d) provided:
"Nothing contained in this section shall be construed as preventing the enforcement of reasonable local regulations now in effect or hereafter adopted, which are not inconsistent or in conflict with this section or the regulations of the Commandant of the Coast Guard established hereunder."

man of the National Transportation Safety Board, in *Hearings Before the Subcommittee on Coast Guard, Coast and Geodetic Survey and Navigation of the House Committee on Merchant Marine and Fisheries on H.R. 867, H.R. 3635, H.R. 8140, and H.R. 6232*, 92nd Cong., 1st Sess. 348-349 (1971). None of the elements of Chapter 125 falls in such categories. Thus, any conclusion that Title I of the PWSA was intended to be preemptive as to the matters at issue in this case is unwarranted.

For its part, the legislative history of Title II of the PWSA is wholly silent on the question of preemption. There is no question that Title II of the PWSA was intended to establish a "comprehensive" scheme of federal tanker regulation. S. Rep. No. 92-724, 92nd Cong., 2d Sess., 1972, U.S. Code, Cong. and Ad. News 2766, 2774. But an intent to be comprehensive cannot be equated with an intent to preempt. See, e.g., *New York State Department of Public Services v. Dublino*, 413 U.S. 405 (1973); *DeCanas v. Bica*, 424 U.S. 351 (1976). This issue was not focused upon during the course of the Senate Commerce Committee's hearings, see *Hearings Before the Senate Commerce Committee and S. 2074*, 92nd Cong., 1st Sess. (1971); it is not mentioned in the Senate Report on the PWSA; and it was not alluded to during either Senate or House consideration of the legislation on the floor. See 118 *Cong. Rec.*, S. 5192, S. 10244, H. 6231, Daily Edition 1972 (March 30, June 25, June 28, 1972).

While Appellees would derive a preemptive intent from the Tank Vessel Act of 1936, 49 Stat. 1889, such an argument is without foundation, for the 1936 Act did not contain any expression of federal preemption of state power.

II. Chapter 125 Is Not Inconsistent with the PWSA's Objective of Encouraging International Agreement

Appellees' suggestion that Chapter 125 upsets the PWSA's goal of encouraging international agreement is wrong for at least two reasons:

First, while it is correct that Congress felt that adequate international regulation of tanker source pollution was a desirable goal, the primary thrust of the PWSA is to protect the domestic marine environment by all appropriate means. The PWSA does not commit the United States to an exclusive international regime. Rather, the Senate Commerce Commitee, in its Report on the PWSA, made it clear that environmental protection should not be "sacrificed" on the principle of international regulation. S. Rep. No. 92-724, 92nd Cong., 2d Sess., 1972 U.S. Code, Cong. & Ad. News 2766, 2783, 2788.

Second, it cannot be emphasized strongly enough that Chapter 125 does not involve the "unilateral imposition" of standards on foreign flag tankers in such a way as to upset the process of achieving desirable, international standards for vessel source

pollution. Foreign flag tankers smaller than 125,000 deadweight tons, regardless of their design or equipment, are perfectly free to trade in Puget Sound if they take state pilots and tug escorts. Moreover, the exclusion of supertankers from Puget Sound is unrelated to design, construction, and equipment requirements of the sort embodied in international agreements and thus in no way impinges on U.S. efforts to promote the adoption of such agreements. Finally, local provisions, based upon local environmental conditions, pose far different questions internationally than a general requirement applicable to *all* vessels entering *all* U.S. navigable waters. It was in fact recognized by a wide group of countries at the time of the last major international pollution negotiation in 1973 that specialized standards are often warranted in areas of special environmental sensitivity. *See* Report of the United States Delegation to the International Conference on Marine Pollution, 1973, at page 18.

III. The Immunity Given to the State from Certain Suits Has Not Been Removed by Either Federal or State Law

Appellees are wide of the mark in their response to Appellants' request for review of the lower court's conclusion that the suit below was not a suit against the State for purposes of the Eleventh Amendment.

First, Appellants have suggested various reasons, too extensive to set out here but discussed in

a memorandum to the Court below, why *Ex parte Young*, 209 U.S. 123 (1908), can and should be interpreted so as not to deny to the State, in this case, the protection guaranteed it by the Eleventh Amendment. Second, Appellees have never argued that Chapter 125 violates any rights guaranteed them by the Fourteenth Amendment (or by any other of the Civil War Amendments). Rather they contend the chapter violates federal rights provided them under, among others, the Commerce Clause and the Supremacy Clause. Appellees here are not in a position, therefore, to invoke the principle of *Ex parte Young*, *supra*, "which permitted suits against state officials to obtain prospective relief against violations of the Fourteenth Amendment." *Fitzpatrick v. Bitzer*, ... U.S. ....., 49 L. Ed. 2d 614, 619, 96 S.Ct. 2666 (1976). *See also Edelman v. Jordan*, 415 U.S. 651, 664 (1974). *Cf. National League of Cities v. Usery*, ... U.S. ....., 49 L. Ed. 2d 245, 96 S.Ct. 2465 (1976). Third, the holding of Washington law cited by Appellees and set out in *Hanson v. Hutt*, 83 Wash. 2d 195, 202, 517 P.2d 599, 604 (1974), simply stands for the principle that suits brought in state courts challenging a statute's constitutionality may be brought in counties other than Thurston County, in which the State capital is located. The *Hutt* case does not stand for the proposition that Washington law provides that the Eleventh Amendment gives the State no immunity from certain suits brought in federal district court. The reason that the State is here

protected by the Eleventh Amendment is that the Appellees are not protected by *Ex parte Young*, *supra*.

CONCLUSION

Appellees have asked that this Court summarily affirm the holding of the court below, as it did in *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972). The decision below in this case differs from that rendered in *Northern States Power Co.*, *supra*, in two important respects relevant to Appellees' request here. First, there the lower court took some pains to examine and analyze the legislative history of the applicable federal statutes; here the court did not. *See* Opinion of District Court, found at Appendix C, Appellants' Jurisdictional Statement. Second, in *Northern States Power Co.* the lower court found that the federal statute and its legislative history provided "the strongest manifestation of Congressional intent to preempt the field of regulation" of nuclear reactors, *Northern States Power Co.*, *supra* at 1152; here there is no comparable manifestation.

Appellants respectfully submit that Appellees' motion to affirm should be denied, and that the Court should note jurisdiction of the appeal.

Dated: February 14, 1977.

Respectfully submitted,

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